

144 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

ISO New England Inc. and
New England Power Pool Participants Committee

Docket No. ER13-1875-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued August 30, 2013)

1. On July 1, 2013, ISO New England Inc. (ISO-NE) joined by the New England Power Pool (NEPOOL) Participants Committee (together, Filing Parties) submitted revisions to the ISO-NE Transmission, Markets and Services Tariff (Tariff) to allow ISO-NE and its market participants to qualify for an exemption from certain provisions of the Commodities Exchange Act (CEA)¹ and Commodity Futures Trading Commission (CFTC) regulations when engaging in specified transactions. As discussed below, we conditionally accept the proposed tariff revisions, subject to a compliance filing, to be effective August 30, 2013, as requested.

I. The Filing

2. Filing Parties state that, on March 28, 2013, the CFTC issued an order (CFTC Final Order)² granting certain independent system operators (ISOs) and regional transmission organizations (RTOs) exemptive relief from CFTC regulation under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).³

¹ 7 U.S.C. § 1 *et seq.* (2006), as amended by Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² *See* Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 78 Fed. Reg. 19,880 (April 2, 2013).

³ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Filing Parties explain that the CFTC Final Order contained certain conditions that the ISOs/RTOs must meet in order to be eligible for the exemption, including that: (1) their tariffs authorize the sharing of market data and information with the CFTC without notice to market participants; and (2) the transactions be entered into by: (i) “appropriate persons,” as defined in the CEA; (ii) “eligible contract participants,” as defined in the CEA; or (iii) “persons who actively participate in the generation, transmission, or distribution of electric energy,” which are defined in the CFTC Final Order as persons who are in the business of either generating, transmitting, or distributing electric energy, or providing electric energy services that are necessary to support the reliable operation of the transmission system.⁴

3. To satisfy these conditions, Filing Parties propose to amend ISO-NE’s Information Policy⁵ to add a specific procedure for disclosure of information to the CFTC. Specifically, Filing Parties propose, as part of section 3.2 of the Information Policy, that furnishing entities will permit ISO-NE to provide confidential information or critical energy infrastructure information (CEII) to the CFTC or its staff in response to a subpoena or other request for information or documentation without notifying the furnishing entities prior to providing the information or documentation to the CFTC. Filing Parties state that, in providing the information to the CFTC, ISO-NE will request that the information be treated as confidential and non-public under the CFTC regulations and will make clear through the confidentiality legend required by CFTC regulations that both ISO-NE and the market participant are the submitters of the confidential information or CEII.⁶

4. Additionally, Filing Parties propose to add a new section II.A.5 to the Financial Assurance Policy to require that all ISO-NE customers and applicants shall at all times be: (1) an “appropriate person” as defined in sections 4(c)(3)(A) through (J) of the CEA; (2) an “eligible contract participant” as defined in section 1a(18)(A) of the CEA and in 17 C.F.R. § 1.3(m); or (3) a “person who actively participates in the generation, transmission, or distribution of electric energy,” which is defined in the CFTC Final Order as a person who is in the business of either generating, transmitting, or distributing electric energy, or providing electric energy services that are necessary to support the reliable operation of the transmission system.⁷ Although not specifically stated in the Financial Assurance Policy revisions itself, ISO-NE states that a market participant may

⁴ CFTC Final Order, 78 Fed. Reg. 19,880 at 19,897.

⁵ ISO-NE Information Policy, Attachment D (12.0.0).

⁶ Filing Parties Transmittal at 9-10.

⁷ *See supra* note 4.

qualify as a person in the business of generating, transmitting, or distributing electric energy by owning physical assets that accomplish these functions.⁸

5. Filing Parties posit that most of ISO-NE's customers will be able to qualify as "appropriate persons" under section 4(c)(3)(F) of the CEA by having a net worth exceeding \$1 million or total assets exceeding \$5 million, or, by providing as allowed under the CEA, a guaranty, letter of credit or keepwell, support or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of section 4(c)(3) of the CEA.⁹ Filing Parties state that the minimum total asset amount that can render an entity an "appropriate person" under the CEA is \$5 million, so, while not specifically stated in the Financial Assurance Policy revisions, a letter of credit used to meet the "appropriate person" requirement must be for an amount equal to the difference between \$5 million and the customer's or applicant's total assets.¹⁰

6. Filing Parties observe that the additional eligibility provisions in section II.A.5 constitute a tightening of the current minimum criteria for market participation provisions that were added to the Financial Assurance Policy in compliance with the Commission's Order Nos. 741 and 741-A,¹¹ which, among other things, were aimed at protecting the markets from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place.

7. Filing Parties state that each ISO-NE customer and applicant must demonstrate compliance with the additional eligibility provisions in section II.A.5 by submitting to ISO-NE a certificate that: (1) certifies that the customer or applicant is now and in good faith will seek to remain in compliance with the additional eligibility requirements of section II.A.5; and (2) further certifies that if the customer or applicant no longer satisfies

⁸ Filing Parties Transmittal at 9 and Mr. Marc D. Montalvo Test. at 8.

⁹ Filing Parties Transmittal at 8. Filing Parties state that the CFTC Final Order clarified that a market participant that provides an unlimited guaranty or other support in the form of a letter of credit, keepwell, or other agreement issued by an "appropriate person" thereby supports its obligation to the RTO or ISO and satisfies CEA section 4(c)(3)(F) criteria. *Id.* at n. 28.

¹⁰ *Id.* at 9. Filing Parties state that any such letter of credit will not be counted toward the satisfaction of the total financial assurance requirements as calculated pursuant to the Financial Assurance Policy. They also state that this treatment is consistent with that given to letters of credit used to meet the capitalization requirements under current section II.A.4 of the Financial Assurance Policy. *Id.*

¹¹ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *reh'g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

the requirements of section II.A.5, it shall immediately notify ISO-NE in writing and shall immediately cease all participation in the New England markets. Filing Parties further state that the Financial Assurance Policy revisions provide that an entity that seeks to qualify as an “appropriate person” by a guaranty, a letter of credit or keepwell, support or other agreement must accompany its certification with supporting documentation reasonably acceptable to the ISO-NE. Filing Parties note that current customers will be required to submit the certificate by September 15, 2013 to allow ISO-NE to collect all certification forms prior to the September 30, 2013 expiration of the no-action relief granted by the CFTC for this condition in the CFTC Final Order. Moreover, the Filing Parties explain that, if at any time ISO-NE becomes aware that a customer no longer satisfies the requirements of the new section II.A.5, the customer shall be immediately suspended and ISO-NE shall initiate termination proceedings against the customer.¹²

8. The Filing Parties request that the revisions be made effective without suspension or hearing on August 30, 2013 to provide market participants with enough time to comply with the new eligibility requirements and to provide ISO-NE with enough time to collect certification forms prior to the expiration of the CFTC no-action relief on September 30, 2013.

II. Notice of Filing and Responsive Pleadings

9. Notice of the Filing Parties’ submittal was published in the *Federal Register*, 78 Fed. Reg. 41,050 (2013), with interventions and protests due on or before July 22, 2013. Exelon Corporation and Northeast Utilities Service Company¹³ filed timely motions to intervene. Freedom Logistics, LLC (Freedom Logistics) filed a timely motion to intervene and protest. On July 23, 2013, NRG Companies¹⁴ filed an untimely motion to intervene. On August 6, 2013, NEPOOL filed an answer to Freedom Logistics’ protest. On August 7, 2013, Easy Energy of Massachusetts, LLC (Easy Energy) filed an untimely motion to intervene and protest in support of Freedom Logistics’ protest.

¹² Filing Parties Transmittal at 7-9.

¹³ Northeast Utilities Service Company is a subsidiary of Northeast Utilities and it files the motion to intervene as the agent for certain Northeast Utilities companies, which include: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and NSTAR Electric Company.

¹⁴ NRG Companies include: NRG Power Marketing LLC, GenOn Energy Management, LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, NRG Canal LLC and NRG Kendall LLC.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant the late-filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁵ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NEPOOL's answer because it has provided information that assisted us in our decision-making process.

B. Protests and Answer

12. Freedom Logistics argues that ISO-NE's interpretation of the exemption category set forth by the CFTC for those entities which "actively participate in the generation, transmission or distribution of electric energy" is unduly discriminatory because, according to Freedom Logistics, ISO-NE has improperly imposed a requirement that a market participant must own physical assets in order to qualify under this category, even though the CFTC Final Order requires only "active[] participat[ion] in the generation, transmission or distribution of electric energy" in order to qualify. Freedom Logistics explains that ISO-NE proposes to codify, in the new section II.A.5 of the Financial Assurance Policy, that a "person who actively participates in the generation, transmission, or distribution of electric energy" shall be as defined in the CFTC Final Order. However, Freedom Logistics points to Filing Parties' Transmittal Letter (at p.8) and attached testimony by Mr. Marc D. Montalvo, ISO-NE's Director of Enterprise Risk Management, which, according to Freedom Logistics would require that a market participant must own physical assets to qualify for the exemption. Freedom Logistics states that such an interpretation is unduly discriminatory because it treats one class of load-serving entities and suppliers (non-owners) differently from another category (owners), when both classes are similarly situated for purposes of the exemption.¹⁶ Freedom Logistics posits that by requiring competitive energy providers to either own physical assets in order to make use of the exemption, or meet onerous and less favorable financial qualification criteria, ISO-NE will force smaller load-serving entities out of the market, and may well deny retail customers the ability to access a sizeable fraction of currently available competitive electric service providers.

¹⁵ 18 C.F.R. § 385.213(a)(2) (2013).

¹⁶ Freedom Logistics Protest at 13-16.

13. Freedom Logistics also protests ISO-NE's proposal with respect to the use of letters of credit. Freedom Logistics states that an "appropriate person" is defined in the CFTC Final Order to include "[a] corporation, partnership, proprietorship, organization, trust or other business entity with a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to [in sections 4(c)(3)(A), (B), (C), (H), (I) or (K)] of the CEA."¹⁷ However, Freedom Logistics points to ISO-NE's statements in its Transmittal Letter that a market participant may provide a letter of credit in an amount equal to the difference between \$5 million and the market participant's total assets. Freedom Logistics takes issue with ISO-NE's proposal to the extent it allows the use of a letter of credit to satisfy the "appropriate persons" test based on the \$5 million total asset requirement, but not on the \$1 million net worth requirement. Freedom Logistics argues that, in implementing the CFTC Final Order in this manner, ISO-NE effectively has established an unreasonably high letter of credit requirement which small entities, particularly load-serving entities and competitive electric service providers, will not be able to meet.

14. Freedom Logistics also argues that ISO-NE proposes use of a guaranty to meet the "appropriate persons" test set forth by the CFTC, but does not provide any guidance or form of guaranty. Freedom Logistics alleges that ISO-NE's proposal regarding any individual market participant's use of such guaranty vests ISO-NE with too much discretion. Freedom Logistics further complains that ISO-NE improperly proposes to terminate any market participant that it believes does not meet the CFTC's "appropriate persons" test without notice or opportunity to cure. Freedom Logistics contends that if the Commission denies its protest in part or in its entirety, then the Commission should direct ISO-NE to establish a wind-up mechanism whereby small load-serving entities, which are forced out of the ISO-NE market because they are unable to meet the new "appropriate persons" test, may conduct an orderly wind up of their business.

15. Easy Energy supports and echoes Freedom Logistics' arguments. Easy Energy states that it is also a small load-serving entity and will be negatively affected by ISO-NE's proposal. Explaining that it does not own any physical assets, Easy Energy posits that it would need to meet ISO-NE's financial assurance criteria to remain active in the ISO-NE markets. Easy Energy opines that, as a small participant, this will prove burdensome and may force it to cease operations. As such, Easy Energy supports Freedom Logistics' request for a wind-up mechanism.

16. In its answer, NEPOOL requests that the Commission: (1) reject the changes sought by Freedom Logistics to the proposed revisions to the Financial Assurance Policy and to accept the filing without change or condition; (2) require Freedom Logistics to

¹⁷ Freedom Logistics Protest at 23 (citing CFTC Final Order at 19,900 and CEA § 4(c)(3)(F)).

pursue any additional provisions or understandings concerning the Financial Assurance Policy through the stakeholder processes ahead of seeking a Commission order compelling such additional provisions or understandings; and (3) ensure that any actions by the Commission do not jeopardize the CFTC exemption.

C. Commission Determination

17. We will conditionally accept Filing Parties' proposed tariff revisions as just and reasonable, subject to a compliance filing, as further discussed below. In Order No. 741, the Commission gave each ISO and RTO discretion to develop minimum criteria through their individual stakeholder processes.¹⁸ Upon further consideration, the Commission finds that the minimum criteria for participation in the organized wholesale electric markets set forth in the CFTC Final Order are appropriate. The proposed tariff revisions are designed to address the requirements of the CFTC Final Order and strengthen the minimum criteria for participation in ISO-NE's market. Therefore, the proposed tariff revisions are consistent with the requirements of Order No. 741. The proposed tariff revisions to ISO-NE's Information Policy also provide similar treatment to information requests by the CFTC and its staff as are provided to this Commission and its staff.¹⁹

18. As to protestors' argument that the lack of a form of guaranty or relevant guidance vests ISO-NE with too much discretion, we disagree. We find that, considering the diverse group of market participants and various ways to satisfy the "appropriate person" standard, it is reasonable for ISO-NE to retain flexibility to address guaranty issues on a case-by-case basis.

19. With regard to Freedom Logistics' argument that market participants should be given the opportunity to come into compliance with the revised Financial Assurance Policy requirements, i.e., an opportunity to "cure," prior to being terminated, we decline to address whether an opportunity to cure is or is not required by the CFTC Final Order. Rather, we find that, in this context, the proposed revisions – which constitute a tightening of the current minimum criteria for market participation – are just and reasonable, as efficient termination is appropriate to help minimize the impact on ISO-NE's market as a whole in the event of an individual customer's default and to help ensure that other market participants do not have to pay for losses associated with that individual customer's default. We further find that market participants will have time before September 15, 2013 to make an initial demonstration that they meet the proposed requirements and, where they cannot meet those requirements, there is adequate time to wind up their business activities should doing so ultimately be necessary (approximately 30 days, from the effective date of the proposed revisions to September 30, 2013).

¹⁸ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 132.

¹⁹ The Commission has previously accepted a similar filing in *California Independent System Operator Corporation*, 142 FERC ¶ 61,069 (2013).

20. With respect to Freedom Logistics' and Easy Energy's arguments that ISO-NE inappropriately proposes to impose a requirement that a market participant must own physical assets in order to qualify as actively participating in the generation, transmission or distribution of electric energy, there appears to be an inconsistency between the proposed tariff language and Filing Parties' Transmittal Letter interpreting that language. ISO-NE proposes to codify, in the new section II.A.5 of the Financial Assurance Policy, that a "person who actively participates in the generation, transmission, or distribution of electric energy" shall be as defined in the CFTC Final Order. However, Filing Parties' Transmittal Letter states that "[a]lternatively, a Market Participant *may* qualify as 'a person who actively participates in the generation, transmission, or distribution of electric energy,' by owning physical assets that accomplish these functions."²⁰ Freedom Logistics and Easy Energy apparently read ISO-NE's interpretation as requiring that appropriate persons "must" own physical assets, and argue that such a requirement is unduly discriminatory because it treats one class of load-serving entities and suppliers (non-owners) differently from another category (owners) and could force smaller load-serving entities out of the market, when both classes are similarly situated for purposes of the exemption.

21. As an initial matter, we note that the language contained in the actual tariff, not an applicant's transmittal letter, is the filed rate. Nevertheless, given the apparent inconsistency between the proposed tariff language, ISO-NE's explanation of it, and the protestors' interpretation of ISO-NE's explanation, we will direct ISO-NE to submit a compliance filing within 30 days of the date of this order clarifying whether it intends for the proposed tariff language to impose a physical-asset-ownership requirement (as opposed to allowing such ownership as an *alternative* way a market participant may demonstrate that it actively participates in the generation, transmission, or distribution of electric energy). In this regard, we share protestors' concerns that such an ownership requirement may unduly discriminate against smaller load-serving entities, and, given the record here, we see no reason for the distinction. Therefore, to the extent ISO-NE intends to impose such an ownership requirement, ISO-NE must either explain why distinguishing among load-serving entities is justified, or clarify its proposed tariff revisions.²¹

22. With regard to the letter of credit requirement, Filing Parties state in their Transmittal Letter that the minimum total asset amount that can render an entity an

²⁰ Filing Parties Transmittal at 8 (emphasis added); *see also* Mr. Marc D. Montalvo Test. at 8.

²¹ We make no finding as to whether allowing for such ownership as an alternative way that a market participant may demonstrate that it actively participates in the generation, transmission, or distribution of electric energy complies with the CFTC Final Order. Our concern here is with ensuring just and reasonable and not unduly discriminatory or preferential rates.

“appropriate person” under the CEA is \$5 million, so a letter of credit used to meet the “appropriate person” requirement must be for an amount equal to the difference between \$5 million and a market participant’s total assets.²² However, ISO-NE acknowledges that the requirement is not reflected in the actual proposed tariff language. Further, protestors question why a letter of credit cannot also be used to make the alternative \$1 million net worth showing to qualify as an “appropriate person” under the Financial Assurance Policy revisions (and as reflected in the CFTC Final Order).

23. At issue in this proceeding is the justness and reasonableness of the ISO-NE’s proposed tariff language. Given the apparent inconsistency between the proposed tariff language on this issue and Filing Parties’ explanation of how it will be applied, though, we will require ISO-NE to submit a compliance filing within 30 days of the date of this order clarifying its proposed tariff revisions. For this reason, we need not address whether Filing Parties are correct in interpreting the CFTC Final Order as requiring that letters of credit be for an amount equal to the difference between \$5 million and a market participant’s total assets.

The Commission orders:

(A) The proposed revisions are hereby conditionally accepted for filing, subject to a compliance filing, to be effective August 30, 2013, as requested, as discussed in the body of this order.

(B) ISO-NE is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²² Filing Parties Transmittal at 9. Filing Parties state that any such letter of credit will not be counted toward the satisfaction of the total financial assurance requirements as calculated pursuant to the Financial Assurance Policy. They also state that this treatment is consistent with that given to letters of credit used to meet the capitalization requirements under current section II.A.4 of the Financial Assurance Policy. *Id.*